2007

State of Utah v. Bridget Marie Hughes : Reply Brief

Utah Court of Appeals

Marian Decker; Assistant Attorney General; Mark L. Shurtleff; Utah Attorney General; Counsel for Appellee.
Scott L. Wiggins; Arnold & Wiggins; Counsel for Appellant.

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff / Appellee, v. BRIDGET MARIE HUGHES, Defendant / Appellant.	)	Case No. 20070291-CA

REPLY BRIEF OF APPELLANT

Appeal from Sentence, Judgment, Commitment, entered on March 16, 2007 in the Second District Court, Davis County, the Honorable Glen R. Dawson, presiding

SCOTT L WIGGINS (5820)
ARNOLD & WIGGINS, P.C.
American Plaza II, Suite 105
57 West 200 South
Salt Lake City, UT 84101
Counsel for Appellant

MARIAN DECKER (5688)
ASSISTANT ATTORNEY GENERAL
MARK L. SHURTLEFF (4666)
UTAH ATTORNEY GENERAL
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, UT 84114-0854
Counsel for Appellee

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160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, UT 84114-0854
Counsel for Appellee

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No Addendum is utilized pursuant to Utah Rule of Appellate Procedure 24(a)(11).

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ARGUMENTS

I. NOTWITHSTANDING THE STATE'S CLAIMS, THE RECORD DEMONSTRATES THAT THE TRIAL COURT ERRED IN DETERMINING THAT THE TOTALITY OF THE FACTS AND CIRCUMSTANCES OF THE STOP DID NOT CONSTITUTE A SEIZURE REQUIRING REASONABLE SUSPICION.

The State argues that "the officers acted with reasonable suspicion." *See* Brief of Appellee, pp. 16-22. In conjunction with its argument, the State claims that Ms. Hughes "fails to properly challenge the trial court's factual findings." *Id.* at pp. 12-16. Finally, the State contends that Ms. Hughes failed to preserve her claim that she was seized because the officers retained her "small little wooden mini bat".[1] *Id.* at pp. 15-16. These arguments are without merit for the reasons set forth, in turn, below.

A. The Marshaling Requirement Does Not Apply Because This Appeal Involves the Trial Court's Application of the Law to the Facts.

In the course of denying the Motion to Suppress, the trial court ruled as follows:

> My best view of this, counsel, is that this never got beyond a level 1 encounter. It's clear from reading the relevant case law that request for identification, that doesn't constitute a show of authority, and by the way I've read State of Utah vs. Mike O'Leary Dean and also Salt Lake City vs. Carolyn L. Rae. And they discuss the difference between a level 1 and level 2 and

[1]Deputy Butcher referred to it as being a "small little wooden mini bat" in the course of his testimony elicited during the evidentiary hearing on the matter (R. 171:29:13-24).

> that's really the critical question here, in my mind at least. They discussed examples of circumstances that mights indicate a level 2 or a seizure. It could be the threatening presence of several officer[s], the display of a weapon by an officer, some physical touching of the person, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled. I didn't see that in any of the evidence before me. It's clear in that same case, in the Salt Lake City case I mentioned, the court indicated that request for identification alone as a matter of law does not constitute a show of authority sufficient to convert an innocent encounter into a seizure. In my view, this never got beyond level 1. The search was consistent - was pursuant to consent and I must deny the motion.

See R. 171:58-59.

The proper standard of review to be applied in the instant case was clarified by the Utah Supreme Court not so long ago in *State v. Brake*, 2004 UT 95, 103 P.3d 699, where the Court stated that the reviewing court is to apply a "non-deferential review" to the "application of the law to the underlying factual findings in search and seizure cases." *Id.* at ¶15, 103 P.3d 699; *see also Layton City v. Oliver*, 2006 UT App 244, ¶11, 139 P.3d 281 ("We review the trial court's ruling on a motion to suppress for correctness, without deference to the trial court's application of the law to the facts.") (citing *State v. Brake*, 2004 UT 95, ¶15, 103 P.3d 699).

In the instant case, the trial court, in the course of applying what it believed to be the relevant case law to the

facts, concluded that "this never got beyond a level 1 encounter." (R. 171:58:10-11). Moreover, the trial court, itself, believed this to be the "critical question" (R. 171:58:16-17). Because this case involves a question concerning the trial court's application of the law to the facts, the marshaling requirement, as a matter of necessity, does not apply.

B. Ms. Hughes Properly Preserved the Seizure Argument for Appeal.

"As a general rule, claims not raised before the trial court may not be raised on appeal." *State v. Holgate*, 2000 UT 74, ¶11, 10 P.3d 346; *see also State v. Cruz*, 2006 UT 45, ¶33, 122 P.3d 543. "The 'mere mention' of an issue without introducing supporting evidence or relevant legal authority does not preserve that issue for appeal." *State v. Brown*, 856 P.2d 358, 361 (Utah Ct. App. 1993) (citation omitted). This preservation requirement is based on the policy that, "in the interest of orderly procedure, the trial court ought to be given an opportunity to address a claimed error and, if appropriate, correct it." *Holgate*, 2000 UT 74 at ¶11 (quotations omitted). Consequently, an objection "must at least be raised to a level of consciousness such that the trial [court] can consider it." *Brown*, 856 P.2d at 361.

In the case at bar, appointed trial counsel explicitly raised the seizure argument, which included the particular circumstance of the officers retaining her "small little wooden mini bat", by not only arguing such in the Memorandum in support of the Motion to Suppress but by way of the elicited testimony of Deputies Butcher and Hawkins during the evidentiary hearing. *See* R. 23, Memorandum in Support of Motions to Suppress and to Dismiss; *see also* R. 171:29:8-24, R. 171:43-44. Ms. Hughes' evidence and argument concerning the "small little wooden mini bat" was part and parcel with her argument that she was seized for purposes of the Fourth Amendment "when the officer "'by means of physical force or show of authority ha[d] in some way restrained the liberty'" of her person. *State v. Bean*, 869 P.2d 984, 986 (Utah Ct. App. 1994) (quoting *Mendenhall*, 446 U.S. at 552, 100 S.Ct. at 1876 (quoting *Terry v. Ohio*, 392 U.S. 1, 19 n.16, 88 S.Ct. 1868, 1879 n.16 (1968)). By virtue of such, the issue, at the very least, was raised to a level of consciousness such that the trial court could consider it. *See State v. Warren*, 2003 UT 36, ¶14, 78 P.3d 590 (stating that when determining the validity of a detention, the court "must view the articulable facts in their totality and avoid the temptation to divide the facts and evaluate them in isolation."); *see also United States v. Sokolow*, 490 U.S.

1, 8 (1989) (requiring a review of "the totality of the circumstances -- the whole picture").

C. The Circumstances Surrounding the Stop by Deputies Butcher and Hawkins Demonstrated a Show of Authority Sufficient to Convert the Stop from a Level One to a Level Two Encounter.

There are three different levels of police-citizen encounters under the Fourth Amendment to the United States Constitution, which are as follows:

> (1) An officer may approach a citizen at any time and pose questions so long as the citizen is not detained against his will; (2) an officer may seize a person if the officer has an articulable suspicion that the person has committed or is about to commit a crime . . .; (3) an officer may arrest a suspect if the officer has probable cause to believe an offense had been committed or is being committed.

State v. Markland, 2005 UT 26, ¶10 n.1, 112 P.3d 507 (quoting *State v. Johnson*, 805 P.2d 761, 763 (Utah 1991)). A level one encounter "'is a voluntary encounter where a citizen may respond to an officer's inquiries but is free to leave at any time.'" *Salt Lake City v. Ray*, 2000 UT App 55, ¶11, 998 P.2d 274 (citing *State v. Jackson*, 805 P.2d 765, 767 (Utah Ct. App. 1990) and *State v. Bean*, 869 P.2d 984, 986 (Utah Ct. App. 1994)). "As long as a person 'remains free to disregard the questions and walk away, there has been no intrusion upon that person's liberty or privacy as would under the Constitution require some particularized and

objective justification.'" *Jackson*, 805 P.2d at 767 (quoting *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S.Ct. 1870, 1877 (1980)).

In contrast to the level one stop, the person, under a level two stop, is seized for purposes of the Fourth Amendment "when the officer "'by means of physical force or show of authority has in some way restrained the liberty'" of a person. *Bean*, 869 P.2d at 986 (quoting *Mendenhall*, 446 U.S. at 552, 100 S.Ct. at 1876 (quoting *Terry v. Ohio*, 392 U.S. 1, 19 n.16, 88 S.Ct. 1868, 1879 n.16 (1968)). Thus, a level one encounter becomes a level two stop and "a seizure under the fourth amendment occurs when a reasonable person, in view of all the circumstances, would believe he or she is not free to leave." *Jackson*, 805 P.2d at 767. This occurs "even if the purpose of the stop is limited and the resulting detention brief." *State v. Steward*, 806 P.2d 213, 216 (Utah Ct. App. 1991); *see also State v. Sierra*, 754 P.2d 972, 975 (Utah Ct. App. 1988) (citing *Delaware v. Prouse*, 440 U.S. 648, 653, 99 S.Ct. 1391, 1395 (1979)). Some examples of circumstances indicating a seizure, even where the person did not attempt to leave include "'the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be

compelled.'" *State v. Patefield*, 927 P.2d 655, 659 (Utah Ct. App. 1996) (quoting *Mendenhall*, 446 U.S. at 554, 100 S.Ct. At 1877).

Arguably, Deputy Butcher's initial request for identification alone did not constitute a level two stop. However, any level one encounter escalated to a level two stop during Deputy Butcher's investigation.

Deputy Butcher initially confronted Ms. Hughes and her two male companions by pulling his patrol vehicle near to where they stood on the side of the road, stepping out of his car and ordering them to come back, asking them, "[W]hat [i]s going on"? Deputy Butcher asked each of them for their age and identification because they "appeared somewhat young" to him. They provided their names and dates of birth inasmuch as they did not have any identification. At that point, Deputy Butcher did not run a records check of the personal information but rather straightway inquired whether they had any weapons without observing anything that caused him to believe there were any weapons on them.[2] Ms. Hughes, upon Deputy Butcher's request, responded by retrieving "a small little wooden mini bat" from her coat sleeve. Deputy Butcher then began checking for weapons by performing a pat down check of one of Ms. Hughes' male companions, during which he

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[2]A period of "several minutes" transpired before running the records check (R. 171:15-16).

located a knife. During that pat down check, Deputy Butcher also located some finger scales and what appeared to be marijuana. He then took the male companion into custody and called for backup. When the second uniformed deputy responded in another patrol vehicle, he approached Ms. Hughes and immediately asked her if she had any weapons. Ms. Hughes responded by informing him that she had previously surrendered the mini wooden bat to Deputy Butcher. Nevertheless, Deputy Hawkins said that he was going to pat her down for weapons, to which she said "no." He then told her that "it wasn't going to be that thorough of a search."

Taking the totality of the circumstances into consideration, a reasonable person in Ms. Hughes' position would not feel free to just walk away by abandoning her property, let alone approaching Deputy Butcher to take back her property and leave. Rather, Deputy Butcher's accusatory tone of voice and language, retention of property,[3] pat down, and custody of her male companion sufficiently restrained Mr. Hughes' freedom to the point that she was seized for purposes of the Fourth Amendment.

"'[A] level two stop . . . must be supported by reasonable suspicion [or it] violates the Fourth Amendment to the United

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[3] *See Salt Lake City v. Ray*, 2005 UT App 55, ¶14, 998 P.2d 274 (discussing how the retention of personal items coupled with other factors create a show of official authority such that a reasonable person would not believe he or she was free to leave).

States Constitution.'"[4] *Salt Lake City v. Ray*, 2005 UT App 55, ¶18, 998 P.2d 274 (quoting *State v. Bean*, 869 P.2d 984, 988 (Utah Ct. App. 1994)); *see also* Utah Code Ann. § 77-7-15 ("A peace officer may stop any person in a public place when he has a reasonable suspicion to believe he has committed or is in the act of committing or is attempting to commit a public offense and may demand his name, address and an explanation of his actions."). Even though this standard is lower than the standard required for probable cause to arrest, the same totality of facts and circumstances approach is utilized to determine if there are sufficient "specific and articulable facts" to support reasonable suspicion. *Ray*, 2005 UT App 55 at ¶18 (citations omitted). "'In determining whether this objective standard has been met, the focus necessarily centers upon the facts known to the officer immediately before the stop.'" *Id.* (quoting *State v. Friesen*, 1999 UT App 262, ¶12, 988 P.2d 7).

Due to the facts known to Deputies Butcher and Hawkins at the time of the seizure, there was no reasonable articulable suspicion supporting the seizure of Ms. Hughes. The facts known to the

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[4] "When challenged, the [S]tate has the burden of proving the reasonableness of the officer's actions during an investigative detention." *State v. Worwood*, 2007 UT 47, ¶23, 164 P.3d 397 (citing *Florida v. Royer*, 460 U.S. 491, 497-500 (1983); *United States v. Carhee*, 27 F.3d 1493, 1496 & n.2 (10th Cir. 1994)).

Deputies were, at the very least, as consistent with lawful behavior as with the commission of a crime. In fact, their testimony confirms such. As a result, there exists no basis upon which to justify the level two stop and seizure of Ms. Hughes, which violated her rights under the Fourth Amendment.

CONCLUSION

Based on the foregoing, as well as that set forth in the previously filed Brief of Appellant, Ms. Hughes respectfully requests that this Court reverse the trial court's denial of her motion to suppress and remand the case for further proceedings consistent with this Court's instructions as set forth in its opinion.

RESPECTFULLY SUBMITTED this 10 day of November, 2008.

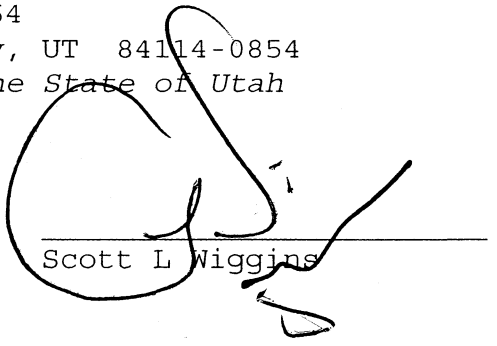
ARNOLD & WIGGINS, P.C.

Scott L. Wiggins
Counsel for Appellant

CERTIFICATE OF SERVICE

I, SCOTT L WIGGINS, hereby certify that I personally caused to be mailed by First-Class Mail, postage prepaid, two (2) true and correct copies of the foregoing **REPLY BRIEF OF APPELLANT** to the following on this 10 day of November, 2008:

Ms. Marian Decker
Assistant Attorney General
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, UT 84114-0854
Counsel for the State of Utah



Scott L Wiggins

ADDENDA

No Addendum is utilized pursuant to Utah Rule of Appellate Procedure 24(a)(11).